

## Response to Prosecution Counsel, Reed Sato

### Response to Part I A

Mr. Sato spent a great deal of time and effort detailing his opinion of the appropriate response to a Quintero objection. Unfortunately, the Quintero objection was not the basis for Ms. Okun removing herself from the case.

In her May 5, 2006 "Request for Continuance", Ms Okun cited the "Morongo case" and specifically the State Water Board counsel's belief "it would be better for the California Water Boards to avoid litigating this issue simultaneously in both cases".<sup>1</sup>

As I stated in my response, if the California Water Boards desire to avoid litigating this issue simultaneously in both cases, then the entirety of Ms. Okun's participation must be removed. Because she has been involved with this case from the start, the entire process would need to start over which would require the Chair to dismiss the entire case to avoid a rehearing after "wasted first-round hearings", "countless hours of wasted staff time and several years of litigation."<sup>1</sup>

Mr. Sato failed to adequately address the single circumstance that Ms. Okun cited as the reason she removed herself from this case: The belief "it would be better for the California Water Boards to avoid litigating this issue simultaneously in both cases."

Even in addressing Quintero, Mr. Sato was off in his assessment.

"Quintero required a review of the totality of the circumstances. The totality of the circumstances here, where a new prosecuting attorney has been assigned before commencement of any of the individual hearings and before the Board hears final arguments or conducts deliberation, cures any possible appearance of material bias, unfairness or undue influence"<sup>2</sup>

While the time constraint I explained in May prevent me from fully detailing "the totality of the circumstances" thus far, here is a sampling:

- Defendants were given two weeks, extended to six weeks, to understand the prosecution, submit evidence and respond to prosecution documents that took four months to prepare. Mr. Sato was given six weeks to simply bring himself up to speed on the case before stating his opinion on the matter.
- The Prosecution submitted an entirely new case on the day defendants were required to submit all evidence and written argument. Defendants were not allowed to respond to the new case or to the Prosecution's response to their arguments and new counsel Reed Sato is on record stating that we should be given the opportunity to respond to any significant changes.
- After procedural issues and public comment, a group of average citizens from Los Osos

<sup>1</sup> "Request for continuance of May 11-12, 2006 hearing on Los Osos Cease and Desist Orders R3-2006-1000-1049" dated May 4, 2006. Signed by Lori Okun. Page 2

<sup>2</sup> "Response to questions regarding presentation of prosecution teams' case. Proposed Cease and Desist Orders nos. R3-2006-1000 to R3-2006-1049" dated June 19, 2006. Signed by Reed Sato. Page 4

proved the Prosecution staff ill prepared and out-matched. Instead of proceeding or withdrawing their failed case, the Prosecution instead brought in a new counsel, obtained further delays, and is working to distort the process to their benefit. All in a supposed effort to comply with a motion they opposed and the Chair denied.

- The Prosecution and Water Board Staff have engaged in a process of "bait and switch" throughout this case and throughout their dealings with Los Osos. This appears to be yet another attempt at a "bait and switch" as in the middle of the hearing, the Prosecution is attempting to change lawyers and the very proceedings themselves in violation of our due process rights.
- Roger Briggs, in a signed statement last January, wrote "The following are the members of the Prosecution Team: myself, Harvey Packard, Sorrel Marks, Matt Thompson, and counsel Lori Okun. I will supervise the Prosecution Team staff. Phil Wyels will not be supervising Lori Okun in this matter."<sup>3</sup>

In May we were told that Mr. Briggs is not Ms. Okun's supervisor and Ms. Okun referred to Mr. Briggs is merely a witness that cannot be removed from these proceedings.

Now, Mr. Sato replaces Ms. Okun. He informs us that Mr. Briggs will be out of the country for 5-6 months, and contends that Mr. Briggs is a witness that is no longer needed at this hearing.<sup>4</sup>

- In the hearing notice we are told that the 15 minutes is for property specific information only and that we will have the opportunity to have general information after the LOCSD presentation and before individual hearings.<sup>5</sup>

At the hearing we are told that we can only give evidence during our own specific time allotment, but we are allowed to address general info at that time and the Chair can extend our time.

Now Mr. Sato is requesting that we be allowed only our 15 minutes and for property specific information only.

- The Central Coast Regional Water Quality Control Board is on record discussing potential prosecutions with Mr. Briggs, who leads the prosecution team, prior to the beginning of prosecution.<sup>6</sup>
- We were required to submit all evidence and argument jointly when possible, yet we are now required to obtain a notarized "Power of Attorney", and assume the added legal responsibilities and consequences in order to comply with the Chair's mutually conflicting rulings.
- We were required, at our own expense, to submit 12 copies of all our written evidence to the Water Board including two copies mailed to Sacramento and we were told to submit everything in electronic form as well. The Prosecution submitted 8000 pages of documents and refused to make more than a handful of them available electronically. To

<sup>3</sup> "Enforcement actions regarding Los Osos on-site disposal systems" dated January 18, 2006. Signed by Roger Briggs. Page 2

<sup>4</sup> "Response to questions regarding presentation of prosecution teams' case. Proposed Cease and Desist Orders nos. R3-2006-1000 to R3-2006-1049" dated June 19, 2006. Signed by Reed Sato. Page 10

<sup>5</sup> "Consolidated Proceedings for all Cease and Desist Orders April 28, 2006 Hearing" Item four, footnote 2

<sup>6</sup> Transcripts in the matter of Administrative Civil Liability Complaint No. R3-2005-0137; Closing Arguments - Decision Pages 413; 422-425; 430

view the 8000 pages we were required to go down to the RWQCB offices during normal business hours. To get copies we were required to pay for each page.

And this is all before a single defendant has had the opportunity to present their case before the board. Changing counsel at this point not only fails to cure "any possible appearance of material bias, unfairness or undue influence", Mr. Sato's suggestions will create more actual "material bias, unfairness or undue influence".

The "totality of circumstances" is damning.

As I stated at the May 11<sup>th</sup> hearing my time is limited due to the fact that this is the busiest time of year for my company. However, there are a few statements made by Mr. Sato that I feel the need to address. He states, "The Prosecution Team did not anticipate that the procedural question raised by Chairperson Young would follow from the Prosecution Team's change of counsel."<sup>7</sup>

Chairperson Young's questions would naturally follow because Ms Okun's participation in this process at any point will require the California Water Boards to litigate this issue simultaneously in both cases.

Mr. Sato found it "difficult to respond to this question without any indication of how the Los Osos Community Services District (LOCSO) or individual respondents believe they are prejudiced by the hearing process to date."<sup>7</sup>

The questions made no mention of whether defendants or the LOCSO felt prejudiced. The questions were not created in response to any action by the LOCSO or defendants in this matter. The questions were directly due to the "California Water Boards" desire to avoid litigating the Morongo issues simultaneously in that case and this one. At this point, the only way to avoid "wasted first-round hearings", "countless hours of wasted staff time and several years of litigation" is for either the Prosecution to withdraw its case or for the Chair to dismiss this case.

Mr. Sato states, "Because the Prosecution Team voluntarily changed Counsel, it believes that any matter that it previously presented to the Water Board through its former counsel can and should be retained as part of the administrative record for these proceedings."<sup>7</sup>

Then in section III he states, "Roger Briggs will be out of the country for five or six months, starting in mid October 2006. He has already been called as a direct witness by the LOCSO and cross-examined by all parties requesting that opportunity. There is no basis for any additional examination of Mr. Briggs as he has provided as much material and relevant information as is required to support the requested orders. It is hard to imagine that any further examination of Mr. Briggs would not be duplicative."<sup>8</sup>

Apparently Mr. Sato's imagination failed to consider Ms. Okun's comments actually submitted to the Water Board in this matter in her "Request for Continuance".

<sup>7</sup> "Response to questions regarding presentation of prosecution teams' case. Proposed Cease and Desist Orders nos. R3-2006-1000 to R3-2006-1049" dated June 19, 2006. Signed by Reed Sato. Pages 2-3

<sup>8</sup> "Response to questions regarding presentation of prosecution teams' case. Proposed Cease and Desist Orders nos. R3-2006-1000 to R3-2006-1049" dated June 19, 2006. Signed by Reed Sato. Page 10

"As Mr. Briggs testified last week, he has been working on Los Osos Septic system problems periodically since the early 1980's. The District called Mr. Briggs as a witness. As a result, several designated parties cross-examined him. These or other parties might also call him as a witness during the individual hearings."<sup>9</sup>

In cross-examination, defendants were able to address issues raised in his testimony in regards to the questions asked by LOCSD Counsel. In my own packet I have submitted documentation of my conversations with Mr. Briggs. None of the issues I need to address in my time were addressed by the CSD and therefore, I was unable to address those issues with him.

In addition, while Mr. Sato believes this case can proceed without Mr. Briggs participation, Ms. Okun stated that "Removing him from the hearing process is not legally required and, due to his unique role as a witness in this case, **it is not possible.**"<sup>10</sup>

Mr. Sato wrote: "in addition to participating in the April 28, 2006 hearing, Ms. Okun submitted the following written materials: objections to designated party status for individuals (February 21, 2006), two legal memoranda responding to comments (April 19, 2006), evidentiary objections (April 27, 2006) and a request for continuance (May 4, 2006). The Prosecution Team can have its new counsel review, revise if necessary, sign and resubmit all of these documents other than the request for continuance and objection to designated party status (since these have already been ruled on), in order to remove any appearance of unfairness. If the new prosecuting counsel makes any substantive changes to the legal arguments in these documents, individual respondents should be given an opportunity to respond."<sup>11</sup>

Ms. Okun, as Prosecution Counsel was instrumental in assuring defendants and the LOCSD were unable to respond to many prosecution documents when they were first issued. Again, the two counsels are at odds, as Mr. Sato believes we should be given an opportunity to respond to changes while Ms. Okun did not believe we should be allowed to respond to the original documents.

We have had no opportunity to address the "two legal memoranda responding to comments", or even the new prosecution case, as it was submitted on the same day we were required to submit our response. Mr. Sato's stated desire to "remove any appearance of unfairness" (as opposed to removing actual unfairness) is in stark contrast to the actions of his predecessor in this matter.

Mr. Briggs has testified that it will take between zero and seven years to bring prosecutions to the entire prohibition zone. Ms. Okun's recusal and Mr. Sato's contradictions have nearly guaranteed this process as a wasted first round hearing. The LOCSD updated wastewater treatment plan will be completed before another hearing is possible and the Blakeslee legislation will most likely be signed by the governor prior to the completion of this case.

<sup>9</sup> "Request for continuance of May 11-12, 2006 hearing on Los Osos Cease and Desist Orders R3-2006-1000-1049" dated May 4, 2006. Signed by Lori Okun. Page 2

<sup>10</sup> "Request for continuance of May 11-12, 2006 hearing on Los Osos Cease and Desist Orders R3-2006-1000-1049" dated May 4, 2006. Signed by Lori Okun. Page 2

<sup>11</sup> "Response to questions regarding presentation of prosecution teams' case. Proposed Cease and Desist Orders nos. R3-2006-1000 to R3-2006-1049" dated June 19, 2006. Signed by Reed Sato. Page 4

"The totality of the circumstances" in this case suggest the Chair should dismiss the hearing now to avoid a rehearing "after days of wasted 'first-round' hearings", "countless hours of wasted staff time and several years of litigation". It will take up to seven more years to complete this process, plus an additional five to six months since "it is not possible" to conduct this case without Mr. Briggs. Delaying it with more "wasted 'first-round' hearings" would not only be "countless hours of wasted staff time", but time taken away from actually addressing the issues confronting this community.

#### **Response to Part I B**

Since Mr. Sato found it necessary to state that the prosecution reserves all rights, I would like to take this opportunity to state that as a defendant in this case I reserve all rights including the ability to appeal to the SWRB and the courts on any items including but not limited to the Prosecutions inability to maintain a single line of reasoning during this process.

#### **Response to Part I C**

Mr. Sato states, "If the Prosecution Team merely re-presents evidence already submitted, there should not be any additional opportunity to respond." This begs the question when were defendants originally given the opportunity to respond to the case presented by the Prosecution team.

In January, the Prosecution team submitted a 'straw man' case to defendants. We were told numerous times by Prosecution Staff that the January document presented the entirety of their case. Then after defendants responded, we received a new, updated case. An updated case that we were not allowed to respond to or allowed to submit any additional evidence to refute.

Mr. Sato's statement that "there should not be any additional opportunity to respond" ignores the fact that we were never given the opportunity to respond originally.

#### **Response to Part I D**

Mr. Sato believes that if he is given the opportunity to re-present his case, the LOCSD should not be allowed to restart their case. His argument "the individual respondents' rights to due process do not entitle the homeowners to have the LOCSD redo its case for their benefit" ignores the Chairperson's Order of Proceedings notice:

"Note: All of the evidence and comments presented in items 2 through 5 will be incorporated automatically into the record that will be considered for each individual Cease and Desist Order action."

"4. Presentation of Evidence by Los Osos CSD<sup>2</sup> (Estimated time 2 hours)"<sup>12</sup>

If "all of the evidence and comments presented" by the LOCSD "will be incorporated automatically into the record that will be considered for each individual Cease and Desist Order

<sup>12</sup> "Consolidated Proceedings for all Cease and Desist Orders April 28, 2006 Hearing"

action", then to allow the Prosecution to redo their case without allowing the same option to the LOCSD would be an infringement on the due process rights of ALL defendants in this case.

## **Response to Part II**

The Prosecution is once again looking to change the rules after proceedings are well under way. Changes in the proceedings will be added to the "totality of circumstances" leading to Ms Okun's "wasted first-round hearings", "countless hours of wasted staff time and several years of litigation."

If Mr. Sato wants to change the proceedings, let him drop all charges and start the cases over again from the beginning. Mr. Briggs wrote, "The Prosecution Team and the discharger(s) named in the CDOs will be designated parties to the respective proceedings. Other interested persons may seek status as designated parties and the current list of parties will be expanded to include any other persons whom the board determines should be designated as a party to the proceedings."<sup>13</sup>

Mr. Briggs made no mention of a lesser status for other persons the board determined should be designated parties in this case. The board made no lesser distinction when they allowed the LOCSD to be a designated party in this case. Ms. Okun made no motion to object to LOCSD participation in this case as outlined in the Order of Proceedings. Now after the proceedings have begun, after procedural issues have been decided, now Mr. Sato wants to address this.

With the changes he seeks in Section II, I find his comment "The Prosecution Team certainly did not change counsel as a mechanism to retry or delay any aspect of this proceeding or because it felt that there was any weakness in its presentation through Ms. Okun."<sup>14</sup> disingenuous to say the least.

In addition I have to address the misstatement from Mr. Sato on page 9 of his response.

"private interest is low for the individual respondents - - - they are merely being ordered to undertake minimal septic tanks repairs that they should be doing anyway, and to cease violating the basin prohibition and the law. This actions does not impose any penalties."

I direct Mr. Sato to the Water Quality Enforcement Procedures manual, Page 20:

"Section 4477 of the Government Code prohibits all state agencies from entering into contracts of \$5,000 or more for the purchase of supplies, equipment, or services from any nongovernmental entity who is the subject of a CDO which is no longer under review and which was issued for violation of WDRs or which has been finally determined to be in violation of federal laws relating to air or water pollution. The SWRCB provides the list of such violators to other state agencies and publishes the list on the internet at <http://www.swrcb.ca.gov>."

<sup>13</sup> "Enforcement actions regarding Los Osos on-site disposal systems" dated January 18, 2006. Signed by Roger Briggs. Page 2

<sup>14</sup> "Response to questions regarding presentation of prosecution teams' case. Proposed Cease and Desist Orders nos. R3-2006-1000 to R3-2006-1049" dated June 19, 2006. Signed by Reed Sato. Page2

Los Osos is a community with a large number of home-based businesses. My wife and I operate a home-based business as our main source of income. Our company was named one of the 10 largest in San Luis Obispo County by The Tribune. We are members in good standing with the Tri-Counties Better Business Bureau. The affect of placing a CDO on my home and therefore my business represents a SUBSTANCIAL interest for this individual respondent.

This is a matter that I have addressed with Ms Okun, Mr. Thompson, Mr. Briggs, Ms. Marks and was mentioned at the hearing as well. Mr. Sato either failed to confer with the WQEP, the rest of the Prosecution Staff, the hearing transcripts, evidence submissions from defendants and the California Government Code, or he believes that affecting a family's livelihood constitutes a "low-interest". I do not know whether to consider this as ignorance or insult.

Especially when this is viewed in conjunction with his comments under Part A. "Furthermore, Quintero involved the deprivation of the petitioner's fundamental vested rights in ongoing employment."<sup>14</sup>

As I have stated numerous times, which appears to be falling on deaf ears, I am engaged in a process to obtain a large federal contract. A Cease and Desist Order, placed on myself, my home and therefore my home-based business, will deprive me and my employees of our "fundamental vested rights in ongoing employment."

If Mr. Sato truly desires to simply have us undertake minimal septic tanks repairs and cease alleged violations of the basin prohibition and the law, then I encourage him to advise the Prosecution Staff to discontinue this process immediately, and to work with the people of Los Osos to create a solution to this issue.

Since the February 15<sup>th</sup> meeting, where I first understood the alleged reason behind these actions, I have made a vast number of contacts with the Prosecution Staff, including Roger Briggs, Matt Thompson, Harvey Packard, and others, in an effort to implement the EXACT solution Mr. Sato claims to seek. The cover page of my evidence submission specifically addresses this issue without the SUBSTANCIAL added penalties and unintended consequences of a CDO.

I would encourage him as well to work with the people of Los Osos to create a solution instead of threatening homeowner and renters with "\$15,000 per day" fines.<sup>15</sup>

### **Response to Part III**

Regarding removing Mr. Briggs from these proceedings, I refer to prior Prosecution counsel on this matter because I could not state it nearly as eloquently:

**"Removing him from the hearing process is not legally required and, due to his unique role as a witness in this case, it is not possible."** - Lori Okun

<sup>15</sup> "Response to questions regarding presentation of prosecution teams' case. Proposed Cease and Desist Orders nos. R3-2006-1000 to R3-2006-1049" dated June 19, 2006. Signed by Reed Sato. Page 2

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R3-2006-1024